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IN THE

Supreme Court of the United States

October Term 1960

No. 159

REVELL, INC., *et al.*,

Petitioners,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONERS IN REPLY.

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Respondents apparently concede that the court below has decided a federal question in a way in conflict with applicable decisions of this court cited by petitioners. They make no attempt to meet a single contention of petitioners based upon decisions of this court. We refer especially to *Hulburd v. Commissioner*, 296 U. S. 300 (Pet. p. 7), and *Flora v. United States*, 80 S. Ct. 630 (Pet. pp. 7, 10).

We believe that respondents have also shown that the court below has decided an important question of federal law which, in the specific and precise context in-

volved here, should be settled by this court. Respondents state that

> "The Commissioner has consistently found it necessary . . . to file alternative notices of liability." (Br. 5).

They refer, of course, to concurrent notices of the character involved in this proceeding. They point to no decision, nor any statutory provision, upholding the Commissioner's right to do this. If, nevertheless, the Commissioner does this "consistently," then it is in the interest of the federal revenue and of taxpayers throughout the country that the question whether the Commissioner may indeed do this should be settled by this court.

While respondents, as above stated, have completely avoided petitioners' argument, we shall now deal with the points which they do make.

1. Respondents state that it "is conceded that formal deficiency notices were properly issued." (Br. 5). Petitioners do concede that formal deficiency notices were issued. They do not concede that they were "properly" issued.

2. Respondents refer to the notices of deficiency as "alternative notices." (Br. 5). Petitioners submit that there is nothing whatever in the notices to show that they are alternative or intended to be alternative. It would be a gross exaggeration to say that any taxpayer would on reading the notices even suspect that they were alternative.

3. Respondents next speak of the Commissioner's "initial determination." (Br. 5). Which of the several concurrent conflicting "determinations" is the "initial"

one they of course cannot say. Obviously the term "determination" is not appropriate at all. The term "pleading" would be; but the statute requires a determination.

4. The court below predicated its conclusion that there was a determination on its observation that:

> "the statement attached to each notice discloses that the determination of the Commissioner was based upon extensive investigation and detailed information. In short, it appears on the face of each notice that the determination was thoughtful and considered." (Second Appendix to Pet. p. 18).

Respondents now contend, however, that the situation presented results from "alternative possibilities of tax liability, either because of *material issues of law* or *undetermined issues of fact*," and that unless conflicting "determinations" were permitted "determination would frequently have to be made on the basis of *incomplete information* as to the *crucial facts* in the case or without *judicial* determination on a difficult issue of law." (Br. 5; Italics added). What we have actually then is a confession by respondents that, contrary to what the court below thought, these so-called determinations were not based on "extensive investigation and detailed information," that they were not "thoughtful and considered."

Nor do respondents explain why the Commissioner cannot resolve "material issues of law," why a determination cannot be made by him without "judicial" determination on a difficult issue of law. Moreover, if it is a judicial determination that the Commissioner wants, there is absolutely no statutory authority given him to use the procedure of notice of deficiency in order to force the taxpayer to initiate the proceeding for such

a determination. If there is such authority, let respondents point to it.

5. Respondents next refer to the notices of deficiency as "protective" notices of deficiency, and say that "it is not the purpose of the Government to collect the same tax more than once." (Br. 6). But the deficiency notices themselves, as observed above in paragraph 2, completely fail to disclose this.

The same is true of the related notices of demand for tax [Tr., Revell, Inc., pp. 21-22; Tr. Wm. Malat, pp. 14-16; Tr. Louis Lesser Enterprises, p. 9]. What the taxpayers have sought in these proceedings is injunction against actual collection by the District Director of the amounts shown by those notices of deficiency which were not followed by petition in the Tax Court. As to each of those amounts the District Director made, as the cited pages in the transcript of record show, an actual demand for payment by the taxpayer.

None of those demands for tax say that they are protective or that "it is not the purpose of the Government to collect the same tax more than once." Each demand is a simple demand for payment. Thus in Louis Lesser Enterprises, as shown at page 9 of the transcript in that proceeding, the demand for payment describes the assessment and then simply says

> "Please return this notice with payment to District Director of Internal Revenue."

In the Revell, Inc., proceeding the demand is somewhat more insistent. As shown at page 22 of the transcript in that case the demand states

> "If payment of 'Balance due,' which includes interest, is not received within 10 days from the date

of this notice, your account will be assigned to an Internal Revenue Collection Officer without further notice. Under the law, he may levy on your wages, salary, or other income, or seize or sell your property or rights to property to collect this account."

In the William Malat case there was a second demand. As shown at page 10 of the transcript in that case, the second demand contains the following:

"According to our records, the above account for which a statement of tax due was sent to you is still unpaid. It has now been assigned to me for collection.

"Unless you have already paid this account, or make immediate payment directly to this office, we will take action to enforce collection. Such action may result in levy on your property, receivables, bank accounts, salary, wages, commissions or other income as a means of collecting your unpaid account."

There is here no polite invitation to pay. There is no statement that if the amounts demanded are paid the amounts covered by the other concurrent notices of deficiency, on which petitions were filed in the Tax Court, would be abated. There is nothing whatever to apprise the taxpayer that the same tax would not be collected more than once.

Indeed, there is nothing on the face of the notices to show they are conflicting. The taxpayer may honestly be led to believe that he owes all of the amounts. In believing so he files no petition in the Tax Court, which of the amounts, since they are different, will the govern-

ment assess? And if the government assesses all, and the taxpayer pays them, which ones, if any, will be refunded?

6. Next respondents state that the "procedure is adopted only to make certain that the tax will be collected at least once when the questions *as to its amount* and the proper taxpayer have been finally determined." (Br. 6; Italics added). Who is to make that final determination? Is it the Commissioner? Is it a court? Indeed, is the taxpayer to be forced into court in order to have his tax determined?

The very contrary is the law. Under the clear terms of the statute, it is the duty of the Commissioner (or "the Secretary or his delegate" under the 1954 Internal Revenue Code) to make the determination. The only power of the Tax Court is to make a *redetermination*. (Pet. Appendix, pp. 3, 7).

7. Finally, respondents assume that by means of the conflicting "determinations" involved, here litigation involving a single tax can be divided between separate courts. (Br. 7.) But that is the very thing which the *Flora* case, *supra*, says cannot be done.

Conclusion.

Petitioners submit in conclusion that respondents' brief in opposition not only fails to meet but on the contrary emphasizes the points raised in petitioners' brief, and further that the question presented is an important question of federal law which has not been but should be settled by this Court.

Respectfully submitted,

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